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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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OVERSIGHT HEARING ON DEMURRAGE	)	Docket No. EP 754
AND ACCESSORIAL CHARGES	)	
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**SUPPLEMENTAL WRITTEN COMMENTS
OF THE WESTERN COAL TRAFFIC LEAGUE**

Dated: June 6, 2019

Western Coal Traffic League
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Pursuant to the Surface Transportation Board’s (“STB” or “Board”) Decision served May 24, 2019 in Docket No. EP 754 keeping the record open for additional comments, the Western Coal Traffic League (“WCTL”) hereby submits these written comments supplementing WCTL’s written and oral testimony.¹ Board Members, rail stakeholders, and rail customers raised a number of issues in the public hearing held May 22-23, 2019 (“Hearing”), that are of particular import to WCTL Members. How the Board chooses to address these issues will significantly affect our Members’ operations, and as such, WCTL respectfully requests that the Board adopt the following findings:

1. Strict Liability Demurrage and Accessorial Charges Are Unreasonable

The Board should require rail carriers to conduct due diligence, and properly review and “show cause” prior to invoicing customers. Charging customers first and asking questions later is unreasonable and unfairly places a significant burden on shippers to monitor for accuracy and dispute incorrect charges.

As Member Oberman observed, demurrage fees contain two components: (1) compensation to the carrier for equipment use; and (2) penalty charged to the shipper for

¹ WCTL President, Bette Whalen, submitted a written statement to the Board on May 8, 2019 and testified with other coal and energy shippers on Panel XII on May 23, 2019.

inefficient use of equipment. Because the punitive component of a demurrage charge is intended to improve shipper behavior, at least this portion requires a finding of shipper fault. Penalizing a shipper for delays that are not the shipper's fault does not further the intended goal of demurrage programs, as a shipper cannot be incentivized to change behavior it has no control over.

Moreover, as the Board heard, and as WCTL testified, shippers must devote significant time and resources to disputing and recouping incorrect demurrage and accessorial charges, and face substantial resistance from rail carriers. A strict liability demurrage program in which the railroad automatically invoices the shipper without first reviewing and identifying the cause is inappropriate and does not further the purpose of 49 U.S.C. § 10746. Accordingly, WCTL asks that the Board require carriers to conduct due diligence to confirm shipper fault prior to issuing an invoice that includes any penalty component, and, in the event an invoice is issued, provide the shipper with adequate records demonstrating such fault.

2. The Board Must Consider the Rail Customer, and the Rail Customer's Costs, When Evaluating Reasonableness

When determining the reasonableness of a carrier's demurrage or accessorial tariff, and any changes thereto, the Board should take into account: (1) the shipper's specific needs; (2) the railroad's prior operating practice; (3) the costs shippers have expended for rail service; and (4) any additional costs shippers would need to expend to comply with the rail carrier's new policies. Because rail customer needs vary by commodity, the "one-size-fits-all" approach embodied in uniform accessorial and demurrage tariffs is unreasonable. Carrier programs must provide exceptions for customers with demonstrated needs, increased costs, or other restrictions that would make compliance unreasonable.

As WCTL testified, many of its Members have invested substantial amounts of capital to construct facilities and adopt operations to serve the rail carriers' needs. Coal shippers,

specifically, have made significant investments in cars and facilities to support unit train service, as requested by the rail carriers. In doing so, these shippers relied in good faith on representations made by the railroads regarding their service needs and operations. These investments must be taken into account when determining whether a tariff change is reasonable.

3. Greater Reciprocity is Needed in Rail Carrier Practices

Shippers uniformly advocated for an increase in reciprocity and more-balanced procedures in carrier demurrage and accessorial programs, and WCTL reiterates this request here. As WCTL's fellow Panel XII member PBF Energy emphasized, there is great disparity between railroad testimony and actual shipper experience. This is indicative of the broader, pervasive imbalance between carrier and customer that needs rectifying. Specifically, coal shippers incur significant costs when rail service is unpredictable, as maintaining an average cycle time for unit trains is critical for using equipment efficiently, maintaining coal stockpiles at manageable levels, and avoiding penalties from failing to meet minimums required under coal-supply contracts. One way to restore balance is to preserve credit programs to ensure, as Vice Chairman Fuchs stated, that shippers are credited for any debt incurred because of railroad failure. This not only includes ensuring that any crediting program compensates shippers when carriers do not pick up their trains as scheduled, but also ensuring that any credits issued do not expire after only a few weeks.

4. Continued Board Oversight is Necessary to Ensure Reasonable Practices

UP's recent adjustments to its demurrage and accessorial programs are a start, but more needs to be done. UP's acknowledgement of customer concerns and responsive actions are evidence that continued, diligent Board oversight is necessary, including Board-initiated investigations into carrier practices. WCTL urges the Board to continue to initiate investigations

and proactively explore whether carrier practices are actually achieving the intended stated goals and are reasonable, as required by 49 U.S.C. § 10702.

5. Carriers Should Not be Permitted to Sacrifice Quality of Service to Lower Operating Costs in the Name of Efficiency

As WCTL, and numerous other rail customers, testified, the Class I rail carriers have sacrificed consistent and reliable service in the name of efficiency, network fluidity, and asset management. Unfortunately, this quest for efficiency has not resulted in better service; rather, under the guise of improving network fluidity, rail carriers have subjected its customers to increased costs and *worse* service. Coal shippers depend on predictable cycle times for their unit trains in order meet their coal-supply contract minimums and maintain adequate and manageable coal stockpiles. When rail service becomes unpredictable, coal shippers' costs increase, and operations become less efficient and increasingly difficult to manage.

As the Board noted, most of the service complaints it received centered on the implementation of Precision Scheduled Railroading ("PSR") – an operating plan BNSF has not yet adopted. However, while BNSF remains only one of two Class I carriers to not yet adopt PSR, WCTL members can attest that both UP and BNSF are adopting operating practices to "increase efficiency" that have resulted in less transparency and higher costs for shippers.² WCTL urges the Board to continue monitoring these changes in operating practices to ensure they are reasonable, and are not unfairly shifting costs to, and increasing inefficiencies for, rail customers.

² For example, within the past few months, BNSF – without any notice to its customers – has begun to "piggyback" loaded and unloaded unit trains (*i.e.*, run two unit trains together). When BNSF piggybacks trains, shippers lose visibility of their railcars, as BNSF's system only displays the lead train ID. This has resulted in notable errors, such as loading a train at the wrong mine. BNSF does not alert shippers before piggybacking trains, and while piggybacking is not as problematic with empties, this practice causes significant issues with loaded cars.

CONCLUSION

As Vice Chairman Fuchs noted in his opening remarks of the Hearing, the concept of demurrage itself is not in dispute here – greater network efficiency and increased asset management benefits both freight rail customers and carriers alike. The issue, rather, is how carriers have used these charges to further tilt the scales in their favor and disadvantage shippers. As currently implemented, demurrage charges are simply another way for carriers to lower their operating costs and extract additional revenues from shippers. WCTL, again, commends the Board for not only opening this proceeding, but for recognizing how important these issues are to rail customers and the significant impact they have had on rail customer operations. We reiterate our requests to the Board for continued oversight, and urge the Board to adopt the aforementioned findings.

Respectfully submitted,



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